JAMMIE C. SHELTON	*	**NO. 2001-CA-1308**
VERSUS	*	**COURT OF APPEAL**
NEW ORLEANS JAZZ AND HERITAGE FOUNDATION, INC., FAIR GROUNDS CORPORATION, ACCEPTANCE/REDLAND INSURANCE COMPANY AND XYZ INSURANCE COMPANY	* * * *	**FOURTH CIRCUIT** **STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-2822, DIVISION "N"
HONORABLE ETHEL SIMMS JULIEN, JUDGE
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JUDGE MICHAEL E. KIRBY

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(Court composed of Judge Michael E. Kirby, Judge Max N. Tobias, Jr., Judge David S. Gorbaty)

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This is a personal injury case in which the plaintiff allegedly injured herself walking into a carpeted, flanged post in the middle of a walkway at the Fairgrounds during the Jazz Festival. The defendants, New Orleans Jazz and Heritage Foundation, Fair Grounds Corporation, and Acceptance/Redland Insurance Company, appeal the findings of the trial court. Specifically defendants appeal the *de facto* finding of strict liability, the lack of substantiation for some of the damages, and the lump sum award of $575,000.00.

STATEMENT OF THE FACTS

Mrs. Jamie Shelton, plaintiff, attended the Jazz and Heritage Festival at the New Orleans Fair Grounds on April 27, 1997. Mrs. Shelton was accompanied by her young son, Jenile. She parked her car just off of Esplanade Avenue and entered the Fair Grounds area. They purchased their tickets and proceeded into the festival area.

The plaintiff stated that she and her son walked in a large crowd to a

point where they came to an orange colored walkway. In the center of the walkway constructed by the Jazz Festival was a flanged post. The post was carpeted by the Jazz Festival personnel in charge of safety. The post was not part of the walkway, but had been left standing in the middle of the walkway during the Jazz Fest. Mrs. Shelton, who is blind in her right eye, turned her head to the left to look for their destination, the Gospel tent, and walked into the post, striking herself in the pelvic area. She did not fall nor was she turned around by the impact. Nevertheless, she struck the post at the point that protruded outward in her direction.

After striking the post, Mrs. Shelton went to the Gospel tent but found that she could neither sit nor stand comfortably. She therefore went with a friend to the medical tent to get some ice. The personnel at the medical tent offered to call an ambulance to bring her to the hospital, but she believed that the discomfort would pass and declined the offer with the intent of seeing her own physician, Henry Evans, the next day.

On April 28, 1997, Mrs. Shelton treated with Dr. Henry Evans, a non-board certified practitioner in the area of Family Medicine and General Practice. On the initial examination after the accident, Dr. Evans detected

“mild ecchymosis” but made no other objective findings. By the next visit on May 15, 1997, the ecchymosis had resolved.

Dr. Evans saw the plaintiff regularly through April 7, 1999. There was a hiatus in his treatment of the plaintiff at this point; he did not see her again until September 30, 2000. During his initial period of treatment, Dr. Evans made several diagnoses: contusion, neurogenic pain not associated with a particular nerve, and neuropathy to a peripheral nerve (the femoral or ilioinguinal nerve). Dr. Evans admitted that until Dr. Maria Palmer diagnosed injury to a peripheral nerve, he felt Mrs. Shelton’s complaints were quite disproportionate and was confounded by her complaints.

Dr. Maria Palmer began treating the plaintiff on referral from Dr. Evans on April 7, 1998, nearly a year after the accident. She, too, treated Mrs. Shelton fairly regularly until May 24, 1999. As was the case with Dr. Evans, there was a hiatus in Dr. Palmer’s treatment of plaintiff. She did not see Mrs. Shelton again until November 7, 2000. Dr. Palmer made an initial diagnosis of a contusion to the femoral nerve and maintained that diagnosis.

Dr. David Kline treated the plaintiff during the fifteen months that the plaintiff did not see Drs. Evans or Palmer. Dr. Kline is a renowned expert in

injuries to the peripheral nervous system.

Dr. Kline initially suspected an injury to the ilioinguinal nerve. In addition to his careful clinical examinations, he had electrodiagnostic studies performed by Dr. Sumner, another noted expert. He never suspected injury to the femoral nerve and his clinical tests, along with Dr. Sumner's testing, confirmed, that there was no injury to the femoral nerve. Ultimately, however, he concluded that he could not even say more probably than not that Mrs. Shelton had sustained an injury to her nerve. Therefore, he could only say that more probably than not she had sustained a bruise as to her pelvic area as a result of walking into the carpeted, flanged post in issue.

Only after Dr. Kline gave this deposition testimony, did the plaintiff resume treatment with Drs. Palmer and Evans.

The psychologist, Yvonne Osborne, PhD., treated Mrs. Shelton from July 6, 1998. The plaintiff has also been seen by numerous other healthcare professionals for treatments such as nerve blocks and/or second opinions.

No vocational rehabilitation or functional capacity specialist examined the plaintiff. Drs. Palmer and Evans testified that they believed that the plaintiff was suffering from chronic pain that could be permanent.

Nevertheless, they did not testify that plaintiff was totally disabled from work of any sort at the time of trial or that she would remain so. In short, the plaintiff offered little evidence of future total functional disability, outside of evidence that the pain may be chronic.

In contrast, Dr. Klein was questioned about those issues and testified that the longest period of recovery with which he is familiar for a bruise like that which he believes Mrs. Shelton sustained is 3-4 years. He has never placed any restrictions on her working.

On December 11 through 14, 2000, a bench trial was conducted. The trial court took the matter under advisement and rendered a Judgment, with reasons, on February 13, 2001. The trial court found in favor of the plaintiff and made a lump sum award of $575,000.00. In its reasons the court found the carpeted, flanged pole to be an unreasonable risk, and although not stated, made the defendants *de facto* strictly liable. On February 16, 2001, a Notice of Signing of the Judgment was issued. A timely Petition and Order for a Suspensive Appeal and a Suspensive Appeal Bond were filed. On March 21, 2001, a Judgment assessing costs was entered from which a timely appeal was also taken.

STATEMENT OF THE LAW

Standard of Review for Liability

This accident occurred in 1997, thus La. C.C. art. 2323 applies and comparative fault is to be assigned if found. As stated above, plaintiff walked into a post. She was not watching where she was going when she struck the post, and because she had a duty to do so, some fault must be assessed to her. La. C.C. art. 2323. Because the trial court did not account for this legal duty in its finding of liability and assessed no fault to her, we find legal error and need conduct a *de novo* review of the findings of liability.

Liability

The determination of liability, i.e., of whether constructing a walkway with a pole in the middle of it is an unreasonable risk, is a mixed question of law and fact, to which we will apply the duty/risk analysis. *Pitre v. Opelousas General Hospital*, 530 So.2d 1151 (La. 1988).

The first question is did the defendant have a duty to protect against an unreasonable risk created by the construction of their walkway at the Jazz

Festival? The answer to this question is a resounding “yes”. La. C.C. art. 2317. This leads to the next question: does a carpeted, flanged post in the middle of a walkway constitute an unreasonable risk?

The defendant, through its safety engineers, did attempt to protect against harm to pedestrians on the ramp by covering the tip of the flanged post with carpet. The carpet was wrapped around the tip of the post with tape attached to the carpet to hold it in place. The safety engineers concluded that the risk of harm from someone walking into that covered post was not so great as to justify the cost of removing the pole, moving the ramp or altering the pedestrian flow in another manner. To support their conclusion they cite the large number of pedestrians who traversed the ramp/post-configured walkway without injury to themselves. For example, in 1997, more than 200,000 people traversed the ramp in question safely. In the several other years in which the ramp/post configuration was used, more than half a million people traversed it without incident, or at least without a report of an incident.

Also noteworthy to the duty/risk analysis is the testimony of the plaintiff’s safety expert, Michael Frenzel. He testified that the cost of

making this walkway safe would have been low and suggested three cost-effective methods to make it so. The first option would be to place the walkway where there was no post, which would cost nothing, other than a potential lengthening of the distance or lessening of efficiency. The second choice would be to make the post in the walkway removable by putting a flank or attachment at the bottom and unbolting it and removing it for the festival and replacing it after the festival. Since only one post was in a walkway, this would have required a one-time minimal investment. The third choice would be to barricade the post by enveloping it with plywood to make an island or raise a flag above eye level to mark its location.

We find the fact that the Jazz Festival engineering team left an unmarked obstacle in the middle of a walkway they created to channel pedestrians is substandard conduct. The fact that the plaintiff is blind in her right eye does not lessen their fault for the configuration, as the plaintiff's safety engineer testified. It is foreseeable that people at a fair or festival will be distracted, thus the Jazz Festival has some fault in not taking further action to prevent the possibility of harm.

However, it is the plaintiff's duty to maintain a guard as to where she walks. *Alexander v. City of Baton Rouge*, 98-1293 (La. App. 1 Cir. 6/25/99), 739 So.2d 262. This duty to watch where you walk exists, even if, as

plaintiff alleges, a tall man was walking before her for some twenty-five yards. Plaintiff should not have followed this person so closely. For these reasons, we find the trial court committed legal error because it made the defendant *de facto* strictly liable for plaintiff's injuries, and plaintiff must have some liability for not watching where she walked.

After reviewing the record, we find that plaintiff was 40% liable for not watching where she walked. We assign 60% fault to the defendant because the defendant's conduct was substandard. The post was only about waist high and would have been more easily seen if some marker had been placed above it. At the very least there could have been a pole tied to the post with a flag on it to give pedestrians some prior notice as to its location. The cost of a pole tied to the post with a plastic flag on it would have been minimal. Therefore, we assess 40% fault to the plaintiff and 60% fault to the defendant.

Damages

The defendant argues that the trial court erred in that plaintiff did not prove the existence of injuries greater than a bruise.

It is axiomatic that plaintiff bore the burden of proving both the existence of injuries and a causal connection between them and her accident by a preponderance of the evidence. *Greening v. Bell*, 28-689 (La. App. 2

Cir. 9/25/96), 681 So.2d 36. First we will look at the testimony concerning the soft tissue and nerve damage. Then we will look at the psychological state of the plaintiff and examine the causal connection with any damage that may have resulted from striking the post.

The plaintiff testified about, and Dr. Evans confirmed, bruising in the groin area the day after the accident. Dr. Evans prescribed Motrin for the pain and advised Mrs. Shelton to stay on bedrest for a week. Mrs. Shelton returned to work the following Monday. After returning to work, she later stated to Dr. Evans that the Motrin was not alleviating the pain sufficiently. Dr. Evans recommended therapy and gave her a cortisone shot. Plaintiff's groin area and lower abdomen were swollen and sensitive to touch. The plaintiff testified that occasionally she had numbness in the thigh and on the right; she also had radiation of pain into the groin area and more into the vagina. Plaintiff testified the pain was constant and it was aggravated by walking; it even interrupted her sleep. The therapy did not help.

Dr. Evans referred her to Dr. Stephen Harkness. Dr. Harkness ordered an MRI and nerve conduction studies, which did not show anything out of the ordinary. Dr. Harkness also ordered a TENS unit which ultimately did not help alleviate the pain.

Dr. Maria Palmer testified that her neurological examination showed

an area of increased sensation in the mid aspect of the thigh approximate to the groin. She interpreted this as sensory findings over the femoral nerve. Dr. Palmer also found tenderness in the lower quadrant abdomen and pain radiating down into the ankle. Dr. Palmer's diagnosis was that she had a contusion of the femoral nerve in the lower abdomen.

Dr. Palmer prescribed Neurontin, a drug used by neurologists, which is also an antidepressant. The plaintiff made follow-up visits and the complaints were consistent with the first visit. The medicine alleviated the pain, but left her feeling drowsy often, a side effect of the drug. On subsequent visits, for example July 7, 1998, the pain continued, and Dr. Palmer recommended she increase the dosage of the pain medication to alleviate it. Dr. Palmer testified that the pain plaintiff felt was more likely than not caused by the accident at the Jazz Festival.

Dr. Palmer testified that she later prescribed more antidepressant drugs for the plaintiff because they increase the pain threshold. Mrs. Shelton complained of pain for years. Dr. Palmer stated that the chronic pain in the plaintiff caused depression.

Another side effect Dr. Palmer testified to was a sprain and swelling in the right foot from having to alter her gait. Dr. Palmer testified that later the plaintiff had to go to the emergency room due to severe headaches,

which were the result of another drug prescribed, Effexor. Plaintiff underwent a CT scan and spinal tap while there. The plaintiff was prescribed Prozac.

Another ailment was discovered at the hospital; plaintiff had high blood pressure. This Dr. Palmer thought could be a side affect of medication or due to the pain and severe headaches. Dr. Palmer also testified that plaintiff's hair loss could be due to the long list of anti-depressant drugs and pain medication that she was taking.

The defendants' expert, Dr. David Kline, who treated the plaintiff for fifteen months, testified that he never believed that there was an injury to Mrs. Shelton's femoral nerve. He suspected that there may have been injury to her ilioinguinal nerve. However, after extensive clinical testing and examination, as well as EMGs, nerve blocks and other objective testing by Dr. Sumner, he simply could not confirm that there was, in fact, any damage to Mrs. Shelton's ilioinguinal nerve. Therefore, the only diagnosis he could make was that more probably than not Mrs. Shelton had bruised her pelvic area.

Another defense expert, Dr. Donald Adams stated that in his opinion, the plaintiff did not sustain injury to either her femoral or her ilioinguinal nerve.

Nevertheless, it is to be noted that the proximity of the femoral and ilioinguinal nerve is immediate, and only via surgery can findings be verified conclusively, which in the plaintiff's case was not in her best medical interest.

The defendants presented evidence that contradicted the cause of plaintiff's pain and depression, and consequent prescribing of so many anti-depressant drugs: the death of her twenty-one year old son on February 22, 1997, about two months before the accident.

However, we note that "a tortfeasor takes his victim as he finds her." *Cazenave v. Pierce,*568 So.2d 1360, 1366 (La. App. 4 Cir. 1990); *Reck v. Stevens*, 373 So.2d 498 (La. 1979); *Kuck v. City of New Orleans*, 531 So.2d 1142 (La. App. 4 Cir. 1988). It would be quite speculative for us to determine exactly what amount of Mrs. Shelton's pain and depression was caused by the accident and what amount was due solely to the loss of her son. For this reason in *Buras v. Petroleum Helicopters, Inc.*, 95-1629 (La. App. 4 Cir. 12/17/97) 705 So.2d 766, 772, citing *Maranto v. Goodyear Tire & Rubber Co*., 94-2603 (La. 2/20/95), 650 So.2d 757, 762, we stated that:

> The determination of whether a particular accident caused a person's injuries is a question of fact that is reviewed under the manifest error standard. *Maranto,* 94-2603, 94-2615 at p. 7, 650 So.2d at 762.

As concerns the factual finding of causation, there is certainly a sufficient amount of expert testimony to support, as a rational perspective, that the proximate cause of the plaintiff's pain and damages was the accident. Even if this court feels that some of the depression was due to the personal trauma unrelated to the Jazz Festival accident, it is not a manifestly erroneous finding to say that the accident triggered these formerly latent problems and caused them to arise.

Moreover, the fact finder is entitled to give more weight to a more time- relevant examination as would occur under the findings of the plaintiff's personal physician in the normal course of events, rather than a physician for the defense who examines a patient in preparation for litigation and months or years later. *Dauzat v. Canal Ins. Co.,*96-1261 (La.App. 3 Cir. 4/9/97), 692 So.2d 739; *Iorio v. Grossie*, 94-846 (La.App. 3 Cir. 10/4/95), 663 So.2d 366. This is yet another reason why it was plausible for the trial court to accept the plaintiff's treating physicians' testimony over that of the defendants' expert testimony.

For the foregoing reasons, we affirm the factual finding of the trial court as concerns causation of plaintiff's pain and depression.

Monetary Awards

The trial court signed a Judgment assessing costs against the

defendants, in the amount of $8,883.27. We affirm the judgment assessing all costs against the defendant.

The trial court made a lump sum monetary award of $575,000.00. Future medical expenses were estimated to be $100,290.00, while past medicals were stipulated to be $25,711.32. This comes to a total of $126,001.32. We affirm these amounts.

Subtracting the past and future medical awards from the lump sum award leaves $448,998.68, which we assume to be the award for general damages and loss of future earnings. We assume that this sum comes from the plaintiff's expert economist, Dan Cliffe, who opined that the plaintiff's loss of future earnings ranged from $78,530.00 to $253,000.00. The remainder of the lump sum would be the trial court's general damage award.

Mr. Cliffe opined that the plaintiff's loss of future earnings ranged from $78,530.00 to $253,000.00. We consider Mr. Cliffe's estimates of future lost earnings to be high for the following reasons in the record. First, as concerns the plaintiff's loss of future earnings, the amount of working years plaintiff has left, ten and a half (10 ½) years according to plaintiff's economist, is not on the high end of the scale, given plaintiff's age at the time of this accident. Second, plaintiff worked as a teacher's aide. The record shows that plaintiff did not prove it was more probable than not that

she would pass the National Teacher's Exam, a prerequisite for a Louisiana Teaching Certificate. Without such a certification, the plaintiff could not earn a teacher's salary. Therefore, based upon the evidence in the record, we find $78,530.00 to be the best estimate of the plaintiff's future lost earnings.

As concerns the trial court's general damage award, we note that such an award may be reversed if it is an abuse of discretion; that is, if it is beyond that which a reasonable trier of fact could assess for similar injuries. *Youn v. Maritime Overseas Corporation*, 623 So.2d 1257 (La. 1993).

In *Pellerin v. Humedicenters, Inc.*, 96-1996 (La. App. 4 Cir. 6/11/97), 696 So.2d 590, the plaintiff suffered similar consequences. As a result of medical malpractice, plaintiff was diagnosed with "right cutaneous gluteal neuropathy" injury to another peripheral nerve. She experienced intense, chronic pain. She underwent treatment with a TENS unit, physical therapy and medication. Ultimately, she was treated at Touro Infirmary's Chronic Pain Clinic. She further testified that she was "moderately depressed." She experienced some reduction in her pain as a result of the medication, but only approximately fifty percent. She further reported fear of running or participating in other sports because she was concerned with recurrence of her extreme pain.

The trial court jury awarded $48,000 for general damages and $20,000

for loss of enjoyment of life. In the appeal we stated that "…we cannot say that the jury's award is 'beyond that which a reasonable trier of fact could assess.'" *Pellerin, supra* at 8, 696 So.2d at 594, citing from *Youn, 623 So.2d at* 1261.

The award of $68,000 for similar injuries gives us guidance and makes the award in this case appear extremely high and an abuse of discretion. Therefore, we reduce the award to the plaintiff for general damages and loss of enjoyment of life to $150,000.00, the highest sum we believe the trier of fact could have awarded.

Thus, we find the past and future medicals to be $126,001.32. We find the loss of future earnings to be $78,530.00. And finally, we find the general damages and loss of enjoyment of life to be $150,000.00. The total of these sums is $354,531.32, subject to reduction for plaintiff's forty (40%) percent comparative fault. As stated above, the Judgment assessing all costs against the defendant is affirmed.

REVERSED IN PART; AMENDED IN PART; AFFIRMED IN PART